United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2304

United States Court of Appeals

SECOND CIRCUIT

Docket No. 74-2304

RONALD LANDON,

Plaintiff,

—against—

LIEF HOEGH AND CO., INC.,

Defendant.

A/S ARCADIA,

Defendant and "Plaintiff" Seeking Joinder-Appellant,

—against—

GULF INSURANCE COMPANY,

Plaintiff or Defendant or Involuntary Plaintiff-Appellee.

BRIEF OF APPELLANT A/S ARCADIA, DEFENDANT AND "PLAINTIFF" SEEKING JOINDER

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PRELIMINARY STATEMENT

This is an appeal by A/S Arcadia, owner of m/s Hoegh Opal (hereinafter the "shipowner"), from the judgment entered in the United States District Court, Eastern District of New York, on the 23rd day of October, 1974 dismissing the "complaint—over under 19(a) [FRCP]" (A-61)[1] against Gulf Insurance Company (hereinafter "Gulf"), the compensation insurance carrier for Pittston Stevedoring Corporation (hereinafter "Pittston"), contract stevedore aboard the vessel at the time of plaintiff's accident and his employer. Gulf insured Pittston for their liability for compensation under the Longshoremen's and Harbor Workers' Compensation Act and paid plaintiff's

[1]References are to pages in the Joint Appendix.

disability benefits and incurred expenses in connection with medical treatment of plaintiff, allegedly arising as a result of the injury in suit.

Plaintiff brought suit in the court below to recover damages for personal injuries allegedly sustained aboard m/s Hoegh Opal on February 7, 1973 as a result of the shipowner's negligence. This action is therefore subject to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act which provide, among other things, that plaintiff can recover against the shipowner only for negligence, not unseaworthiness, and that the employer or its insurer shall not be liable, "directly or indirectly," to the shipowner for "such damages" which the employee or anyone "otherwise entitled" may recover. 33 USC 905(b).

In answers to interrogatories served by the shipowner, plaintiff claimed liability for his injuries on the basis of the shipowner's permitting an accumulation of ice and snow to remain on the vessel's main deck, offshore of the No. 4 hatch, and in "causing and permitting [the] improper and unskillful cleaning of the deck" (answer to interrogatory no. 4) (A-17, 18). The accident allegedly occurred at 8:45 a.m., 45 minutes after plaintiff began (answer to no. 6) (A-19) performing work which is subject to his employer's mandatory compliance with the provisions of the Safety and Health Regulations for Longshoring requiring the stevedore to correct slippery conditions as they occur. 29 CFR Part 1918, Par. 7889.

Following service of its answer, the shipowner moved by Notice of Motion filed May 29, 1974 (A-22) for an order pursuant to Rule 19 FRCP directing Gulf to join plaintiff's action as party plaintiff in order that it might assert its claim against the shipowner to recover the amount of compensation paid to plaintiff under the Act, $736.80, as well as the cost of medical treatment which is

said to have been $377.00.[2] At the same time, the shipowner moved for leave to implead plaintiff's employer under Rule 14 FRCP. These motions were granted by order dated June 14, 1974, plaintiff not opposing (A-27). Pittston was never joined as third party defendant, and the shipowner's right to implead the employer of an injured longshoreman to obtain indemnity is not now at issue, since passage of the amendments to the Act. On June 20, 1974 the shipowner filed a Rule 19(a) complaint (A-28, 31) alleging that Gulf had a claim for damages for the amount of compensation benefits for which it had become liable, which was subject to defeat, assuming that the shipowner would be found liable in negligence to the plaintiff, by proof that the accident alleged was brought about by the concurring negligence of Pittston and its employees, including plaintiff. (Ibid para. 9) (A-30). Gulf was also informed that in the event plaintiff recovered against the shipowner, the shipowner would refuse to pay Gulf

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[2]Since Rule 19(a) provides that a person subject to service of process, whose joinder will not deprive the court of subject matter jurisdiction, "shall" be joined "if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest," its use is appropriate here if Gulf has a *claim* against the shipowner rather than a "lien." Gulf and plaintiff are "needed" parties since the negligent shipowner may be liable to *either* plaintiff and Gulf *or* plaintiff alone, *or* to Gulf alone, if the compensation expense ("lien") equals or exceeds the verdict. This assumes that Gulf's claim, as distinguished from plaintiff's, can be defeated by proof of stevedore negligence. This procedural aspect was not an issue below, and we assume will not be here. It should not. In *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 381-382 (1949) the Supreme Court expressly sanctioned use of Rule 19 in a similar case. See also *Ward* v. *Franklin Equipment Company*, (ED Va., 1970) 50 FRD 93. Finally, Gulf was brought in, not Pittston, because of 33 USC 933(h) subrogating the insurance carrier for the employer, but Gulf, as subrogee, is charged with Pittston's negligence. *Firemen's Fund Indemnity Co.* v. *United States*, 110 F. Supp. 937, aff'd, 211 F. 2d 773, cert. denied, 348 U. S. 855.

or plaintiff any amount of compensation expenses incurred by Gulf (para. 10) (A-30), and the prayer for relief requested that, in event of default, judgment be entered exonerating the shipowner from any liability to Gulf for past or future compensation benefits (A-31).

On August 16, 1974, Gulf made timely answer to the shipowner's Rule 19 complaint in which it alleged as a first affirmative defense that the complaint failed to state a cause of action (A-32) as well as a counterclaim to recover its compensation expenses against plaintiff (A-33) and the shipowner (A-34). Gulf also asserted a claim of "lien" against both plaintiff and shipowner amounting to $1,113.80, the amount of its compensation expenses (A-33, 34). On August 23, 1974, the shipowner moved pursuant to Rule 12(f) FRCP for an order striking the affirmative defense alleging that the complaint failed to state a cause of action. On or about September 24, 1974, Gulf cross-moved pursuant to Rules 56 and 12 FRCP for an order striking the Rule 19 complaint. The shipowner's motion was denied and Gulf's granted by order of the Court (Hon. John F. Dooling, Judge) dated October 10, 1974 complying with Rule 54(b) FRCP; on October 23, 1974 judgment of final dismissal of all claims against Gulf was entered, from which the shipowner now appeals. The decision has not been officially reported.

STATEMENT OF THE CASE

At issue is the nature of the right of a stevedore or its subrogated insurer to recover from a shipowner the amount of compensation expense for which it has become liable by operation of the Longshoremen's and Harbor Workers' Compensation Act, as a result of a shipboard injury.

Gulf claims a "lien" on the *proceeds* of a successful suit by plaintiff and asserts that it is entitled to recover its compensation expense irrespective of *any* degree of fault of its insured, Pittston, in causing the accident alleged. As the Court below held, Gulf may recover its so-called lien, may "off load to the shipowner [it's] entire liability under the [Compensation] Act" even if the injury sustained by plaintiff was caused by a "trivial, but legally sufficient, amount of negligence [by the shipowner] . . . even though the employer's negligence was the most significant proximate cause of the accident, and the employer was in breach of duties that [it] owed to the shipowner in respect of the accident and damage. . . ." (A-60-61).

It is the position of the shipowner that the stevedore or its insurer has a *claim* against it for damages resulting from negligence, subject to defeat by proof of the stevedore's negligence in bringing about the injury:

> (1) A stevedore-employer has a cause of action against the shipowner to recover its damages, its compensation liability, and is entitled to sue either under provision of 33 USC 905(b) or under the general maritime law.
>
> (2) The purpose of the 1972 Amendments was to hold a stevedore liable for its negligence up to the amount of its compensation liability.
>
> (3) The Supreme Court in *Federal Marine Terminal, Inc.* v. *Burnside Shipping Co.,* 394 U. S. 404 (1969) and the Amendments to the Act in 1972 *and* 1959 overruled the authority contrary to the shipowner's position and resolution of the issue presented is not controlled by *Pope & Talbot* v. *Hawn,* 346 U. S. 406 (1953).

By virtue of the interpretation of the law expressed by the Court below a stevedore, which is 99% responsible for

a longshoreman's injury caused by the 1% negligence of the shipowner, recovers its "lien" i.e. the shipowner assumes the stevedore's compensation liability. This result is the product of the evolution of the Longshoremen's and Harbor Worker's Compensation Act through amendment in 1938 and 1959 as well as in 1972, and attempts by the Supreme Court to reach an equitable balance in interpretating a basically flawed enactment. The act assumed that the interests of the employee and employer were identical in respect of negligent third parties and did not contemplate the joint negligence (ship and stevedore) situation to which the industry by its very nature may be particularly prone.

The result below is unfair, although there is apparent authority for the lower court's holding. What follows supplies a sound and logical basis within the framework of the present case law to work the contrary result Congress intended.

QUESTION PRESENTED

Did the Court below improperly dismiss the shipowner's Rule 19 complaint against Gulf; is the latter entitled to reimbursement of its lien from any recovery obtained by plaintiff, irrespective of the negligence of Pittston in causing the injury alleged?

POINT I

A STEVEDORE-EMPLOYER HAS A CAUSE OF ACTION AGAINST THE SHIPOWNER TO RECOVER ITS DAMAGES, ITS COMPENSATION LIABILITY. SECTION 905(b) OF THE NEW ACT MAY REQUIRE A STEVEDORE TO SUE UNDER THIS SECTION, AS ITS SOLE REMEDY.

The Court below held that Section 905(b) mandated the "sweeping and painful result" requiring a trivially negligent shipowner to reimburse a principally negligent stevedore for its compensation liability resulting from a

longshoreman's shipboard accident. On this holding, and with the belief that the "insulation" of the employer or its insurer from all liability, *including compensation,* was part of the exchange for abolition of the unseaworthiness remedy, Gulf's motion to dismiss the shipowner's Rule 19 complaint was granted.

Section 905(b) provides:

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter. As amended Oct. 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263.

It would appear that an injured longshoreman, "or anyone otherwise entitled to recover damages," can now sue only pursuant to this section and only for negligence.

Two questions have to be initially resolved; whose damages is the cost of compensation benefits and is Section 905(b) properly read as making the stevedore or its insurer a person otherwise entitled? The latter raises additional questions since it is certain that the exclusive remedy provisions of 905(b) apply only to the class of plaintiffs defined, and suit must be brought by them "in accordance with" Section 933. Reference to this latter section is really not much help, as the court's opinion below suggests.[3]

The Court below believed that Section 905(b) controlled all *inter se* rights of shipowner and stevedore. Justification for this holding is properly found only if "such damages" of an injured employee include benefits received in compensation *or* if the stevedore is a person "otherwise entitled" to recover damages (its compensation liability) by reason of the employee's injury and subsequent receipt of such benefits. But if the stevedore is a person otherwise entitled, 905(b) is the exclusive source of remedies of employee, stevedore and shipowner. We first turn to the question of whose damages is the cost of compensation benefits.

The Court below read the statute to require reimbursement of the "lien" without suit, because the court believed that the Rule 19 complaint was an attempt to "pass on some or all of the shipowner's liability *to the longshoreman,* to the employer" (A-60, emphasis added). But is a

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[3]Section 933(a) and (b), the essential subsections, now provide that a person entitled to compensation under the Act may bring suit against a third party and need not elect between compensation and a suit for damages and that *if* a person so entitled obtains compensation pursuant to an award and fails to sue for six months thereafter, *all right* of such person against the third party is assigned to the employer.

negligent shipowner liable to the longshoreman/plaintiff for that part of his lost wages for which he received compensation disability payments or for medical expenses incurred by the stevedore or its insurer, not by plaintiff? This question would seem easy of resolution, for, the shipowner, if liable, will pay the "damages" certainly to the stevedore, not to the plaintiff. If in this case the compensation expense is not Gulf's damages, it would have no interest in the proceeding below by lien, claim or otherwise. The statute cannot mean that the shipowner must pay both plaintiff and Gulf for compensated lost wages and medical expenses. The question of a longshoreman/plaintiff's right to recover both damages from a negligent third party and compensation from his employer was resolved by this court in *Fontana* v. *Pennsylvania R. R. Co.,* 106 F. Supp. 461 (SDNY, 1952), *aff'd,* 205 F. 2d 151, *cert. denied,* 346 U. S. 886, and by the Third Circut earlier in *The Etna,* 138 F. 2d 37 (1943). This resolution is not affected by the 1972 Amendments.

In *Fontana* at p. 463 Judge Weinfeld held that the entire scheme of the Act in force at the time[4] "negate[d] any theory that an injured employee is entitled to both compensation from his employer and damages from third parties," and, relying on *The Etna,* the court held the stevedore to have, through application of the equitable doctrine of subrogation, a right to reimbursement out of the funds recovered by the third party action. Judge Weinfeld assumed, and this appears as the very basis of his opinion, that "Since, in the instant case compensation and medical payments were not made pursuant to an award, the right of action against the responsible third party was *solely* in libellant" (at p. 462, emphasis supplied).[5]

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[4]52 Stat. 1164, 1168.

[5]The evolution of Section 933 of the Act is as follows: The original Act, 44 Stat. 1440 (1927) provided for an election between compensation and a third party action for damages 933(a) and an

Plainly the *Fontana* holding that the stevedore has a right to reimbursement out of the funds recovered (or lien on proceeds) was the product of Judge Weinfeld's assumption that the stevedore had no independent right against the shipowner to recover its compensation liability. This assumption was held to be invalid by the Supreme Court in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U. S. 404 (1969). However, *Fontana* is divisible since the Court considered both the nature of the stevedore's right and that of plaintiff, who was held to have no right to compensation and damages, not because of any assumption regarding the stevedore's capacity to sue but from the basic "scheme"of the Act itself.

In *Burnside, supra,* the Court reversed the decisions of the District and Circuit holding that the stevedore had no right against the shipowner other than the subrogated right provided by Secion 933 because either such right did not exist without the Act or had been cut off by it. At p. 417 the Supreme Court held that the stevedore has "a direct action in tort against the shipowner to recover the amount of compensation payments occasioned by the latter's negligence" upon showing a breach of duty by the shipowner to the stevedore, which it found in *Kermarec* v. *Compagnie Generale Transatlantique,* 328 U. S. 625 (1959).

Since at p. 415 *Burnside* held that liability for compensation payments is the damages of the employer, the

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assignment to the employer of the employee's right of action against the third party upon acceptance of compensation 933(b). The Act as amended in 1938, 52 Stat. 1168, affected 933(b) only and provided for an assignment only upon acceptance of compensation under an award. Apparently, in response to fears expressed by Mr. Justice Black in his dissent in *Ryan Stevedoring* v. *Pan Atlantic S. S. Corp.*, 350 U. S. 124, 144-146, (1956), the Act was amended in 1959 (73 Stat. 391) to provide that the employee "need not elect," 933(a), and that the employee's third party right was assigned only after a lapse of six months from award without suit, 933(b). The 1972 Amendment, 86 Stat. 1262, does not significantly affect Sections 933(a) or (b).

shipowner's Rule 19 complaint cannot now be said to be an attempt to pass on some or all of the shipowner's liability to the longshoreman to his employer, as the Court below held.

This brings us to the second question. The Supreme Court founded the stevedore's right to sue independent of the pre-1972 Act on the absence of clear language cutting off such other right in the ri ,ht granted by Section 933 which was essentially unchanged by the new amendments. But clear language does appear in the new Section 905(b). If Congress intended that the stevedore be entitled to sue under 905(b) by virtue (otherwise) of the nonstatutory right established by the *Burnside* Court, it *must* sue because of the exclusiveness of the 905(b) remedy and must sue "in accordance with" 933.

After the 1938 Amendment to Section 933 depriving the employer of its automatic assignment of all rights upon payment of compensation and substituting an identical assignment upon payment of compensation pursuant to an award, and before *Burnside,* courts held that the stevedore had no right to sue where compensation had been paid without an award. See e.g. *Liberty Mutual Insurance Co.* v. *United States,* 290 F. 2d 257 (2 Cir. 1961). This belief was, in turn, the principal basis of the "lien" (lien on proceeds) approach to the stevedore's right, since equity, equitable principals of subrogation, required it in order to do justice.[6] However, an argument can be made that "otherwise entitled" does *not* include the stevedore as a party who

[6]We do not wish to oversimplify. There is a weak argument to be made for preservation of a negligent employer's "lien." See Larson, *Workmen's Compensation Law,* Vol. 2, Section 75.23 (Bender 1974). We will deal again with this question in Point III. The shipowner contends that the rationale of the land-based cases holding the "lien" unaffected by proof of employer negligence is singularly inappropriate in a maritime law longshoreman's personal injury action. A fair overview of the decisions of Federal Courts applying the maritime law will bear this out.

must sue under this Section. Comparison of 905(b) and 933(a) may demonstrate that persons otherwise entitled are "person[s] entitled to compensation," e.g. persons entitled to death benefits under the Act. This might mean that 905(b) relates only to causes of action brought by persons entitled to compensation and does not affect the independent *inter se* rights of vessel owners and stevedores, except in respect of "such damages" of compensatible persons, beyond what they have received under the Act.

However, if the stevedore *is* otherwise entitled, it must sue "in accordance with" Section 933 which speaks only of the employee's right (subsection (a)), and of the employer's right (subsection (b)), only in circumstances which now virtually never occur. The statute does not say "by virtue of," only "in accordance with." A suit authorized by 933 is (1) an employee's action before the statutory assignment and (2) an employer's for all right of the employee six months after an award. Can an employer sue for its compensation liability without *violating* provision of the section without an assignment of all the employees rights? In mind of the uniformity of the holdings of pre-*Burnside* cases,[7] does Section 933, this *time,* cut off the right of the otherwise entitled stevedore to sue the shipowner—does equity require the stevedore have a lien on the proceeds of an employee's suit since it has nothing else? In resolving these issues, this Court is bound by the *Burnside* holding that compensation liability is the stevedore's damages, irrespective of what other impact, if any, the 1972 Amendments may have had on this decision.

The *Burnside* decision also controls what this Section, as opposed to Section 905(b), cuts off, since 933 was not significantly changed by the Amendments. If Section

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[7]*The Etna, supra; Fontana, supra; Joyner* v. *F & B Enterprises, Inc.*, 448 F. 2d 1185 (USCA D. C., 1971); *Hugev* v. *Dampskis-aktieselskabet International,* 170 F. Supp. 601, 606-607 (SD Cal., 1959), affirmed, 274 F. 2d 875, cert. denied, 363 U. S. 803 (1960).

933 did not cut off the stevedore's maritime law right to sue the shipowner, how can an employer's suit under 905(b), assuming that this is its appropriate remedy, be cut off except for reason that it is not "in accordance with" Section 933. But reference to Section 933 is necessary *only* in respect to the "in accordance with" provision of 905(b). It would appear that *any* 905(b) suit by an employee *or* an employer, if it is so entitled, would be in accord with Section 933, *except* a suit by the employee brought more than six months after obtaining an award. Reading the provision of Section 905(b) giving a person otherwise entitled a remedy for recovery of damages by reason of an injury to a person covered under the Act and the "in accordance with" provision of the same subsection, in their literal sense, would lead to what we feel is the better view—that Section 905(b) gives a stevedore-employer a right to sue the shipowner for its compensation liability.[8] If this interpretation of the statute is correct, and if compensation liability is the stevedore's damages, it can sue for these damages before, or in absence of, the occurrences which make 933(b) operative when it accedes as virtual trustee to all the compensated employee's rights. Moreover, Section 905(b) now provides the clear language necessary to cut off any other remedy of the stevedore and could mean that the statute is the exclusive remedy of the stevedore as well as the employee. If this interpretation is sound, 905(b) codifies *Burnside* and requires the stevedore to bring suit, and the interpretation of the stevedore's right as an interest in the proceeds of the longshoreman's suit, by application of the equitable principal of subrogation, would be but a historical curiosity. Section 905(b), far

[8]It would appear that Congress, in Section 905(b), *was* trying to establish all the remedies among the three parties. This may be inferred from the provision of 905(b) barring indemnity from the employer for the employee's damages. Again, whose damages is the lien?

from barring the stevedore's suit against the shipowner, might make it the mandatory and exclusive remedy of the stevedore.

Burnside also held that the stevedore's maritime law action, which may have been subsumed by Section 905(b), was subject to defeat by proof of concurring negligence by the stevedore. In *Burnside* at p. 417-418, the rule of *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 285 (1952) was expressly held to apply to the stevedore's suit against the shipowner, and the Court assumed that the stevedore was "faultless vis-a-vis Burnside [the shipowner]."

But the Court below held, by implication, that the rule of *Halcyon* did not apply to the assertion by Gulf of its "lien" and that the shipowner, if negligent, would be liable to plaintiff for full damages, part of which it would be required to pay Gulf, irrespective of Pittston's negligence, and only if Gulf did not sue.

In summary, *Burnside* established the independent, parallel right of a stevedore to sue a shipowner for its damages, which the Supreme Court defined as its compensation liability. This right was separate and distinct from the right given by Section 933 of the statute by way of assignment of all plaintiff's rights in certain circumstances. This right was, however, subject to defeat by proof of concurring stevedore negligence. Subsequently, Congress, perhaps aware of the *Burnside* holding, provided, possibly, through Section 905(b), that the stevedore, otherwise entitled to recover damages by virtue of *Burnside,* be given the now exclusive remedy of a suit for negligence under this provision of the Act.

But if Section 905(b) was not intended to apply to the *inter se* rights of the shipowner and stevedore in respect of other than such *actual* damages sustained by an injured employee or his representative, *Burnside* survives

the passage of the 1972 Amendments, and the stevedore has a maritime law right independent of statute to sue the shipowner, subject to defeat by proof of its negligence. However, since the stevedore has a right to sue either under statute or under the maritime law, the basis for the treatment of its right as a lien on proceeds is now obsolete. That is, 905(b) applies to the stevedore and is its exclusive remedy, or, it does not, in which case 905(b) does not affect its rights and does not cut off its *Burnside* cause of action. In either event, the stevedore can sue the shipowner, and the lien on proceeds treatment of its rights is without substantial foundation, unless for reasons alluded to in footnote 6 above, there are sufficient policy considerations requiring its continuance. The intention of Congress and the practical effect of the 1972 Amendments should now be considered in light of the development of the maritime law over the last 25 years. Since Congress attempted to ensure that the employer would bear the cost of unsafe conditions, we believe that this Court will conclude that a negligent stevedore cannot recover its "lien." This view is espoused by the more enlightened recent case law in the area.

POINT II

TO FULFILL THE PURPOSE OF THE 1972 AMENDMENTS A STEVEDORE MUST BE HELD LIABLE FOR ITS NEGLIGENCE UP TO THE AMOUNT OF ITS COMPENSATION LIABILITY

Since passage of the new Act, there have been attempts in the District Courts to define the effect of the Amendments on the relationship of the shipowner and stevedore. The major effort was made in *Lucas* v. *"Brinkness" Schiffarts Ges. Franz Lange G.m.b.H.*, 1974 AMC 1085, not

yet officially reported, where a panel of three district court judges in the Eastern District of Pennsylvania decided motions to dismiss third party complaints by impleaded stevedores, who had been brought into the action pursuant to Rule 14 FRCP. The shipowner had asserted a right against the stevedore to a *"pro tanto"* or *"pro rata"* apportionment of prospective liability to plaintiffs, as well as for counsel fees. The shipowner urged the so-called "Murray Credit,"[9] seeking reduction of its liability by one half since there were two "defendants," or, in the alternative, that the shipowner's liability be reduced by the amount of compensation paid to plaintiff. The latter argument was based wholly on equitable grounds. The result sought here is the same as was urged on equitable grounds in *Lucas,* although the basis of argument is entirely different. In *Lucas* the District Court granted the stevedores' motion, holding that 905(b) prevented adoption of the "Murray Credit" and that the counsel fee claim and claim for *pro tanto* diminution of the shipowner's liability up to the amount of the "lien" were contrary to the intent of Congress in enacting the new legislation. We do not quarrel with the Philadelphia court's decision that continuation of the claim for counsel fees, on a *Ryan* basis or otherwise, is clearly contrary to Congressional intent. But it is plainly another matter to say that Congress intended to "insulate" the employer from liability for compensation payments to its employees (Cf. *Lucas, supra,* at p. 1097) or that the amendments be interpreted in such manner as to *guarantee* exhaustive litigation in virtually every case.

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[9]*Murray* v. *United States,* 405 F2d 1361, (C. A. DC 1968). See *Dawson* v. *Contractors Transportation Corp.,* 467 F2d 727 (C. A. DC 1972); *Turner* v. *Excavation Construction Inc.,* 324 F. Supp. 704 (DC DC 1971); *Anthony* v. *Norfleet,* 330 F. Supp. 1211 (DC DC 1972) and *Perchell* v. *District of Columbia,* 444 F2d 997 (C. A. DC 1971).

Senate Report No. 92-1125, 92nd Congress, 2nd Session, contains the following statement of policy:

> SAFETY
>
> It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.
>
> This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's compensation system which maximizes industry's motivation to bring about such an improvement.

House of Representatives Report No. 92-1141, 92nd Congress, 2nd Session,[10] which accompanied the House version of the amending bill, states:

> PURPOSE AND BACKGROUND OF LEGISLATION
>
> Amendments to the Longshoremen's and Harbor Workers' Compensation Act are long overdue. This

[10]United States Code, *Cong. and Admin. News,* Vol. 3, pp. 4698-4699.

> Act has not been amended since 1961. In that year, the maximum benefit under the Act was set at $70 a week. Today, the average longshoreman's or ship repairman's wage is over $200 a week in some ports. In order to provide adequate income replacement for disabled workers covered under this law a substantial increase in benefits is needed. Although employer groups indicated their willingness to increase worker benefits, they sought a modification of a long line of Supreme Court rulings. These decisions ruled that a shipowner was liable under the doctrine of seaworthiness, for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore's employer on theories of expressed or implied warranty, thereby transferring their liability to the actual employer of the longshoremen.
>
> It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety. . . .

If the ruling of the Court below is correct, the stevedore or its insurer will, in every case where plaintiff can prove trivial negligence on the part of the shipowner, bear only initially the cost of unsafe conditions causing an accident and creating compensation liability. For it will pay appropriate compensation and impress its "lien" on the proceeds of each suit brought against the shipowner by a compensated employee. If plaintiff wins, the stevedore wins, and its vigilence regarding safety would, we expect, be propor-

tionately reduced depending on its experience in recouping compensation expenses through exploitation of its so-called lien. Moreover, with the law in its present posture, considering the vastly increased compensation benefits available under the new Act, suits by longshoremen will, to say the least, not be readily settled, at least if the employee-plaintiff has exerted his full compensation remedy and obtained an amount for permanent disability. Thus, it is appropriate to consider whether Congress intended that the law be interpreted in such manner that it denies an injured longshoreman either access to an "easy" settlement in a proper case or that he jeopardize this possibility by resorting to full exercise of his compensation rights.

Compensation benefits as of October 1, 1975 can be 200% of the average national average weekly wage for each week a longshoreman is totally disabled as a result of a shipboard accident.[11] Awards for permanent disability continue to be based on a fixed number of weeks depending on the bodily member involved. For example, total disability of either upper extremity entitles an injured longshoreman to 312 weeks[12] of compensation and a longshoreman so disabled may be entitled to 312 times twice the average national weekly wage which might, for purposes of illustration, be $250 per week, or a total entitlement of $78,000. A longshoreman who loses an arm in a shipboard accident as a result of only colorable vessel negligence will sue even where plainly the substantial role in causing the injury was played by his negligent employer. This leaves the shipowner and the injured longshoreman in a dilemma. The employee must choose between a certain award and a less certain lawsuit. If he chooses the former, he will certainly have a trial on the latter, since the shipowner will risk a jury verdict in hope of exoneration from negligence. In these circumstances, to

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[11]33 USC § 906(b)(1)(D).
[12]33 USC § 908(c)(1).

settle plaintiff's non-compensatible claims for damages, such as for pain and suffering, at a fair discount reflecting the availability of proof of liability and plaintiff's contributory negligence will require the shipowner, depending *only* on the sufference of the stevedore, to settle the "lien" claim with the principally negligent stevedore on less favorable terms, since the stevedore's claim, unlike plaintiff's, is unaffected by proof of negligence. But the viciousness of the present interpretation of the recoverability of the "lien" is demonstrated more clearly where the injury is trivial but where plaintiff has received an award for permanent disability as a result of which he has been amply compensated. In that case trial should more certainly ensue. To settle with an intransigent "lienholder," all or a major portion of the compensation liability will have to be returned to the stevedore by the shipowner in satisfaction of the "lien" before the latter will be *allowed* to settle plaintiff's claim. Negotiations between the three interested parties will proceed without consideration of the stevedore's negligence, unless this negligence is so plain that, as a practical matter, it exonerates the shipowner. No doubt, some shipowners will settle with plaintiffs without satisfying the lien, giving the longshoreman guarantee of relief from a later claim by the stevedore against the settlement fund, i.e. against the proceeds of suit. This shipowner will hope that the stevedore will not assert the lien by means of suit and subsequent summary judgment in the stevedore's favor for the amount of the settlement. Another shipowner may proceed to trial in every case hoping that its trial experience will discourage suit in a marginal case and that the subsequent attitude towards the lien taken by the stevedore will be accordingly softened. Some plaintiffs, perhaps in part because of the attorney's contingent fee retainer, and the less generous attitude towards fees taken by the Compensation Board, will eschew the award. This will facilitate settlement because the stevedore

will waive its "lien" for medical expenses and weekly payments for temporary total disability in exchange for relief from the potentially much larger award for permanent partial disability. Thus the plaintiff obtains a quick settlement which, after deduction of the attorney's fee, may be less than the potential award, and the shipowner will be made to bear the major portion of the cost of unsafe conditions which Congress intended be borne by the stevedore as incentive to maintain the highest standards of on-the-job safety. It is easy to appreciate that the initial position of the stevedore will be one of absolute rigidity concerning the "lien." It is the stevedore's hope that this will encourage the shipowner to assume a very high percentage of the stevedore's compensation liability in fear of the cost of defending every suit.

As the law is presently interpreted a situation has developed where settlement prospects in most cases are remote. This may, in time, overburden the courts. At the center of the dispute is the inviolate "lien" which short-sighted stevedores will manipulate in such manner as to guarantee either that the costs of these accidents to the industry will be maximized or that the injured longshoreman will not be fairly compensated. At present the stevedore has the advantage. Only it incurs no expense in recovering its damages. The threat of the expense to the shipowner of defending each case through trial in hope of a defendant's verdict will tip the balance decisively in the stevedore's favor and will enable it to strike a harder bargain in negotiating recovery of its damages than will plaintiff. A final policy consideration, the legal implications of which may be beyond the scope of this argument, is that the lower court's ruling places a shipowner which employs its own longshoremen in a significantly better competitive position.

If, on the contrary, the stevedore has a *claim* for damages, not a lien, its interest, or that of its insurer, will be

adequately protected by the plaintiff who has an identical interest in proving vessel negligence and for that purpose disproving the shipowner's claim that the cause of the accident was, in reality, stevedore negligence. Moreover, in a clear case of joint negligence the stevedore may concede its lien. In any event, should the stevedore wish to retain its own counsel, its attorney might find a contingent fee arrangement to his liking. Attorneys' fees would not in any event be "a drain on funds available for compensation under the Act." *Lucas, supra,* at p. 1097. The jury need not know of the compensation received by plaintiff, since they will be required, assuming the shipowner is found liable, to determine only whether the stevedore had been negligent as well. Many stevedores in the Port of New York are self-insured, and even the presence of an insurance company plaintiff need not necessarily raise the suspicion of compensation in the mind of the trial jury. But most importantly, the Court's ruling below works an unfair and inequitable result, contrary to the cherished equitable basis of the maritime law. The maritime law *is* equity.

The rule of interpretation of statutes was laid down by the Supreme Court in *United States* v. *American Trucking Association, Inc., et al.,* 310 U. S. 534 (1940). It is that the courts must look to the intention of Congress in construing the statute and should consider whether even the *plain meaning* of a statute should be given effect if to do so would produce an unreasonable result, plainly at variance with the policy of the legislation as a whole. The comment of this Court in *Williams* v. *Pennsylvania Railroad Company,* 313 F. 2d 203 (1963), in considering an issue similar to the one presented here, must also be given heed. At pp. 209-210 Judge Friendly stated "that it [one of two tortfeasors] should nevertheless succeed in fastening the entire loss upon the . . . [other] . . . thereby escaping even the Compensation Act liability it would have borne as . . .

employer in the absence of any fault by either defendant . . . is a result not readily acceptable under 'a legal system that has been so responsive to the practicalities of maritime commerce and so inventive in adaption of its jurisdiction to the needs of that commerce.' *Swift & Co.* v. *Compania Columbiana del Caribe,* 339 U. S. 684, 691 (1950)."

POINT III

THIS COURT IS NOT BOUND BY PRIOR AUTHORITY WHICH HAS BEEN EFFECTIVELY OVERRULED BY INTERVENING LEGISLATION AND SUBSEQUENT SUPREME COURT DECISIONS

It is necessary to understand what has gone before to fully appreciate the paradoxical position of the shipowner which here is claiming that it can be sued by the stevedore, while the latter claims it cannot. The history of the law of longshoremen's personal injury actions, the development of the Longshoremen's and Harbor Workers' Compensation Act and the recent case law must be given due consideration. The shipowner also must acknowledge, and does, that the precise result sought here, which is, of course, apportionment of liability upon proof of negligence between the shipowner and stevedore, with the liability of the stevedore limited to its compensation obligation in consideration of its liability without fault, has been reached before, only to be rejected by the Supreme Court. *Baccile* v. *Halcyon Lines, et al.,* 187 F. 2d 403 (3 Cir. 1951), reversed, *Halcyon Lines, supra.* See also *Pope & Talbot* v. *Hawn,* 346 U. S. 406 (1953).

First, if this court decides, as did Judge Dooling, that lost wages and medical expenses which plaintiff has not lost, and has not paid, are "such damages" nonetheless of the plaintiff, the argument presented by the shipowner here is concluded, for Section 905(b) provides precisely that.

Second, if compensation liability in the amounts paid by the stevedore or its insurer is not "such damages" of the employee but the damages of the employer, then if Congress intended that all rights of the three interested parties be governed by Section 905(b), not only for such damages actually sustained by the employee, which would be his damages in addition to compensation, but also for damages of the employer, i.e. if the stevedore is "otherwise entitled" to recoup damages (compensation liability), the argument which follows is for that reason unnecessary. For under this Section, Congress would be held to have given the stevedore this exclusive remedy in exchange for the subrogated right to a lien on the proceeds of an employee's suit, assuming, as we do not, that this right survived *Burnside*. Suit would be required and the joining of Gulf as a Rule 19 plaintiff would be appropriate.

It would appear that only three factors gave rise to the lien on proceeds concept, for the Compensation Act itself does not provide for a "lien." *Ruggiero* v. *Rederiet For M/S Marion*, 308 F. Supp. 798, 800 (SDNY, 1970). The first was that a double recovery by plaintiff was unconscionable. Second, that the 1938 Amendments to the Act had divested the stevedore of its right to sue and the "lien" was required to protect its interest and, third, that there might be reasons of policy for protecting the stevedore's lien in consideration of its absolute liability to the employee for compensation[13] and, *most importantly,* to protect the rights of an injured employee.

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[13]This attitude was expressed by Mr. Justice Black in his dictum in *Pope & Talbot* which appears at 346 U. S. at pp. 411-412. There the Court, discussing the shipowner's argument that to reward the plaintiff with a double recovery was improper and that it would be inequitable to require repayment of a "lien" to a negligent stevedore, said "A weakness in the shipowner's argument is that § 33 of the Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries. Pope & Talbot's contention if accepted would frustrate this purpose to protect employers who are subject to absolute

Consideration must be given to whether the Supreme Court's decisions in *Pope & Talbot* and *Halcyon* bar the relief sought since a similar argument, but apparently only on equitable grounds, was made by the shipowner in *Pope & Talbot,* and the *Halcyon* Court reversed the Third Circuit which *had* achieved the result sought. Both *Pope & Talbot* and *Halcyon* involved attempts to sue the stevedore which was assumed not to have the ability to sue the shipowner. The rule against contribution was, therefore, applied in the case, where because of the relative posture of the parties, the shipowner was the one suing for contribution. In neither case did the Court reach the question whether the rule would have applied to the stevedore, had it been suing the shipowner. The indication from Mr. Justice Black's language quoted in footnote 13, *supra,* is that it would not. As we have seen, this reasoning was rejected by the *Burnside* Court which has, moreover, now told us that the *Halcyon* rule *does* apply to the stevedore's maritime law cause of action. It would follow that *Burnside* overruled *Pope & Talbot,* since it is unthinkable that differing results would obtain if a stevedore sues on its *Burnside* right and loses because of its contributing negligence yet would recoup its lien if it did nothing but waited the outcome of the suit by plaintiff. If the shipowner's argument here is accepted, paradoxically the result overruled by the Supreme Court by its *Halcyon* holding is reinstated by the rule of that case itself, since the Supreme Court is still

liability by the Act." However, the *Burnside* Court said, at 394 U. S. p. 413, and this appears to flatly contradict *Pope & Talbot,* "The exclusivity of the statutory compensation remedy against the employer was designed to counterbalance the imposition of absolute liability; there is no comparable *quid pro quo* in the relationship between the employer and third persons. On the contrary, as we emphasized in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.* [citation omitted], the Act is concerned only with the rights and obligations as between the stevedoring contractor and the employee or his representative. It does not affect independent relationships between the stevedoring contractor and the shipowner."

committed to the rule against contribution when the availability of compensation is a factor. See, in addition to *Burnside, Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 74 AMC 537 (1974) (not yet officially reported).

Following *Pope & Talbot* the Supreme Court tired of the specter of a negligent stevedore recovering its lien, which it had allowed, and created the contractual "warranty of workmanlike service" in the particularly egregious stevedore negligence case of *Ryan* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956).[14] This decision surely stripped *Pope & Talbot* if not *Halcyon* of any remaining vitality. See Gilmore & Black, *The Law of Admiralty*, p. 371 (Foundation Press 1957). But the Supreme Court never directly said so. Following *Ryan*, a negligent stevedore virtually never recovered its "lien," since its negligence was a breach of waranty. In this connection see the extreme case of *Hartnett* v. *Reiss Steamship Co.*, 421 F. 2d 1011 (2 Cir., 1970), cert. denied, 400 U. S. 852 (1970), where a 1% contributorily negligent employee-plaintiff established such a breach.[15]

In this context, *Ryan* is itself a statement that the Supreme Court does not wish a negligent stevedore to recover its lien. In the small keyhole in the legal sky, post *Sieracki*,[16] i.e. after stevedore negligence could cast a shipowner in liability for unseaworthiness, post *Halcyon* but before *Pope & Talbot* and *Ryan*, the District Court in

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[14]Prior to *Halcyon* contribution was thought by some to be available in a maritime non-collision case. See *Portel* v. *United States*, 85 F. Supp. 458 (S. D. N. Y., 1949, Kaufman, J), and cases cited therein at p. 462. A negligent stevedore had an unqualified right to recover its 'lien" only between 1952 (*Halcyon*) and 1956 (*Ryan*).

[15]"Conduct sufficient to preclude" (never until very recently broadly interpreted, compare *Horton & Horton, Inc.* v. *T/S J. E. Dyer*, 428 F. 2d 1131 (5 Cir., 1970), and *Hurdich* v. *Eastmount Shipping Corp.*, — F. 2d — (Slip opinion Nos. 907, 1037 p. 5409, Sept. 12, 1974) (2 Cir., 1974)) was in reality, a last clear chance or break in the chain of causation concept.

[16]*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946).

Firemen's Fund Indemnity Co. v. *United States,* 110 F. Supp. 937 (ND Fla., 1953), aff'd, 211 F. 2d 773, cert. denied, 348 U. S. 855 (1954) held a negligent stevedore's insurer barred from recovering its compensation "lien" by operation of the rule of *Halcyon.* The same result was reached earlier in England in the lucid decision of *Cory & Son Ltd.* v. *France, Fenwick & Co. Ltd.,* 1 K. B. 114, (1911) where the court held the negligent employer not entitled to recover its compensation liability from the negligent third party because of the rule against contribution. The employer had its own entitlement, its own right to sue, and did not "stand in the shoes" of the employee. Similar results have been reached in the United States. See, *Brown* v. *Southern Ry.,* 204 N. C. 668, 169 S. E. 419 (1933), where the North Carolina Supreme Court said at p. 671: "Nevertheless, when . . . the employer seeks to recover the amount paid by him [for compensation], from such third party, his hands ought not to have the blood of the dead or injured workman upon them, when he thus invokes the impartial powers and processes of the law."

The rule that the employer's concurring negligence is a *defense* available to the negligent third party in an employee's suit is, however, the minority rule. See Larson, A., *Workmen's Compensation Law,* Vol. 2, Section 75.22 (Matthew Bender 1974). California in addition to North Carolina permits such a defense. The reasoning of the leading California case, *Witt* v. *Jackson,* 57 Cal. 2d 57, 366 P. 2d 641 (1961), seems particularly appropriate *because* the case was decided subsequent to the statutory abrogation of the common law rule against contribution, although, of course, no such statutory obligation exists in the maritime law! Prior to *Witt,* California law was expressed in the earlier holdings of the California courts in *Finnegan* v. *Royal Realty Co.,* 35 Cal. 2d 409, 434-435,

218 P. 2d 17, 33-34 (1950), and *Pacific Indemnity Co.* v. *California Electric Works Ltd.,* 29 Cal. App. 2d 260, 270-271, 84 P. 2d 313, 318-319 (1938), which had denied the third party a defense of employer's negligence. The basis of the earlier cases was that in absence of a workmen's compensation statute the third party could not shift part of its responsibility for the judgment rendered against it to the employer because of the common law rule. However, *Witt* held that, since the rule against contribution had been abrogated by statute, in absence of a compensation act a negligent third party *would* be entitled to join the negligent employer in an action for contribution, and the reasoning of the prior cases was "rendered obsolete." *Witt, supra* at p. 648. Additionally, there are cases where the defense has been held available to the third party in a suit by the employer. See *Larson, supra,* Section 75.23 and cases cited therein: *Firemen's Fund Indemnity Co.* v. *United States, supra; American Casualty Co.* v. *South Carolina Gas Co.* 124 F. Supp. 30 (WDSC 1954), and *Alaimo* v. *DuPont,* 11 Ill. App. 2d 238, 136 N. E. 2d 542 (1956). But the Illinois result was later changed by statute. Ill. Rev. Stat. Chapter 48 §§ 138.5 and 172.40 (1967). The same issue is raised, which issue is, of course, essentially one of right to apportionment of liability, when the third party sues the employer or its subrogated insurer for contribution. Professor Larson describes the merits of the availability of such rights as "Perhaps the most evenly—balanced controversy in all compensation law," *Larson, supra,* Section 76.10. Again, the majority rule is that the third party may not have contribution from the negligent employer because such contribution right requires that both alleged tortfeasors be jointly *liable* to the employee. See *Larson, supra,* § 76.22 and cases cited therein. But there are cases where courts have allowed contribution on the theory that the availability of contribution depends on joint negligence not on the capacity for joint

liability for the employee-plaintiff's damages. See e.g. *Newport Air Park, Inc.*, v. *United States*, 293 F. Supp. 809 (D. C. R. I. 1968), and cases cited therein and particularly the court's statement at p. 815 concerning the desirability of the adoption of the "Pennsylvania Rule" allowing a suit for contribution. The court in *Newport, supra,* used the device of treating a "joint tortfeasor" as a "joint wrongdoer," making possible contribution from a party insulated from liability by a compensation statute, in the face of the clear language in the Rhode Island statute abrogating the common law rule and defining from whom contribution may be obtained. Interestingly, the approach taken by the District Court in *Newport, supra,* accords with the reasoning of the Third Circuit in *Baccile, supra,* which was reversed by the Supreme Court in *Halcyon, supra.* Professor Larson acknowledges that whether the negligence of the employer is a defense in the employee's suit, a defense in a suit by the employer, or a basis of affirmative claim of contribution against the employer, the result is the same; he troubles over the availability of an appropriate legal theory. Vol. 2 § 76.22.

In *Cooper Stevedoring, supra,* the Court held the *Halcyon* rule inapplicable where the party from whom contribution was obtained could have been sued directly by plaintiff. This means that in a maritime non-collision case there is now no rule against contribution which would depend *only* upon whom plaintiff chose as defendant. *Cooper Stevedoring* "renders obsolete" the reasoning of the cases overruled by *Witt, supra,* as effectively as did the statutory abrogation of the rule against contribution adopted by the California legislature. *Cooper* also says that contribution rests on a finding of concurrent "fault," that *Halcyon* is still good law on its facts and that the Court in *Halcyon* "Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers'

Act . . . refrained from allowing contribution in the circumstances of that case . . ." where "both parties in *Halcyon* agreed that 'limiting an employer's liability for contribution to those uncertain amounts recoverable under the Harbor Workers' Act is impractical and undesirable.'" *Cooper* states that the *Halcyon* rule applies for the benefit of one "shielded by" the limited liability of the Longshoremen's and Harbor Workers' Compensation Act. This statement is properly interpreted in light of *Burnside* as meaning that the rule applies only when its abandonment raises the possibility of interference with Congressional intentions.

It must be borne in mind that the *Cooper* Court was concerned with the pre-1972 Act and this most recent exegesis of *Halcyon* does not acknowledge the intervening 1959 amendments to the Act. As we have seen, this gave an injured employee six months to sue an allegedly negligent third party from the time of receipt of compensation under an award. Additionally, this amendment provided specific language to the effect that acceptance of compensation did not work an election between compensation and a suit for damages, that the injured employee need not so elect.

Judge Kalodner's reasoning in the Third Circuit case of *Baccile, supra,* was in part based on the implications of the ability of the employer under the then law to force an award under 33 USCA § 933(b). At 187 F. 2d p. 406 he stated that on the facts of that case, were all recovery denied to the shipowner, if there were no relief from the "lien," the entire burden of this employee's suit would undoubtedly fall upon the shipowner, because the employer could be expected to influence the injured employee in his election between compensation or a suit for damages. The court added that, in a case where the employer could not persuade the employee to sue rather than claim compensa-

tion, the stevedore could nonetheless assure recovery of its compensation expenses by means of § 933(e), "by forcing an award under 33 USCA § 933(b). . . ." Under the Act before 1959, treatment of the employer's interest as anything other than the automatic recovery of a lien, as urged by Gulf here, would have affected the employee's rights in a way the Supreme Court thought undesirable. The implication under the law before 1959 of the ability of an employer to force an award was as follows: If an employee made claim for *any* compensation the employer could obtain control of his suit, if it so desired.[17] If the outcome of plaintiff's suit had no possible bearing on the employer's recovery of its "lien," no problem would arise. Expressed another way, if the employee's suit raised no issues bearing directly upon the interest of the employer, and if the employer was satisfied with the prosecution of the suit by the employee without any expense to it, the stevedore would have no motive to interfere in the employee's action. To the contrary, if stevedore negligence had been a defense available to the shipowner, the stevedore might have been impelled to force an award and assume control of the employee's suit. This would then have allowed the employer the apparently unlimited right under Section 933(d) to either institute suit or "compromise with such third person." In a case of obvious joint negligence of shipowner and stevedore, it was not beyond the Supreme Court's anticipation that an award would have been forced so that the case could be settled at a substantial discount of

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[17]An "award" is an order of the Compensation Board making a disposition of an employee's claim for compensation. No great formality was required. See *Toomey* v. *Waterman Steamship Corp.*, 123 F. 2d 718 (2 Cir., 1941) (dictum). If the employer resisted the claim the Board would order (award) compensation and cause an assignment. The 1938 amendment of 933(b) was enacted in response to criticism that the prior law did not alert the employee to the possibility of an election merely by acceptance of compensation. *Cupo* v. *Isthmian Steamship Co.*, 56 F. Supp. 45, 47 (SDNY 1941).

plaintiff's real damages, relieving the stevedore of the possibility of a finding of its negligence and consequent loss of its right to recoup its compensation expenses. The Third Circuit thought to ensure that the stevedore would not have interest in assuming control of the employee's suit by making the "lien" subject to defeat by proof of negligence. We contend that the possibility of collusion between the shipowner and stevedore in the prosecution or settlement of the third party suit led the *Halcyon* Court away from the decision of the Third Circuit, for the very reason that this result, under the then law, would not have achieved the purpose which Judge Kalodner intended. We believe that in this respect the Supreme Court was right and the Third Circuit wrong because of Judge Kalodner's failure to consider the implications of § 933(d). The Supreme Court's *Halcyon* decision assured the result sought in the Circuit with respect to the employee's rights.[18] In effect, the Supreme Court went much further and determined the *inter se* rights of shipowner and stevedore in such manner that they might not in any way impinge on what they perceive to be the paramount right of the employee to obtain compensation without loss of his third party right to sue.[19] Of course, the Supreme Court in *Halcyon* does not refer to the problem discussed here except by clearly identifying its decision as one based on its reading of the policy of the Act. This issue does not again surface until 1956 with the *Ryan* decision and the vigorous dissent of Mr. Justice Black at pp. 146-147 in

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[18]Mr. Justice Black ever bore in mind the possibility that shipowners or employers might seek to evade full compliance with the Act's purpose. He considered first the intention of Congress to guarantee the employee's rights and the practical effect of the Court's interpretations. See *Reed* v. *S.S. Yaka,* 373 U. S. 410 (1963).

[19]A practical, affirmative effect of Mr. Justice Black's *Halcyon* and *Pope & Talbot* rule was to *encourage* employers to *volunteer* compensation "to sustain [an employee] until his third party case was tried." *Ryan, supra,* at p. 144.

which he, for the first time, dealt with this issue directly. The basis for Mr. Justice Black's concern was, of course, removed by the 1959 Amendments.

Limiting the employer's liability to compensation is no longer impractical for reason of uncertainty[20]—is it any longer undesirable and would it interfere with the balance struck by Congress? The Supreme Court has not yet said what the balance is and by footnote in *Cooper* has said only that the Amendments overruled *Sieracki* and *Ryan*. The distinguished Judge below held that the balance struck by Congress requires that a trivially negligent shipowner bear the compensation liability of a principally negligent stevedore, in the face of the Congress' statement that it intended to ensure that the employer continued to bear the cost of unsafe shipboard conditions, without added reference to whether the vessel or the stevedore created or caused such a condition. It may well be that this Court will agree. However, it would seem indeed difficult to support the finding of such a balance on the basis of Supreme Court decisions in *Halcyon* and *Pope & Talbot* which are statements of policy bearing on a compensation statute which since has been twice radically amended. We contend that the intended Congressional balance requires that the *Halcyon* rule apply to the suit by a stevedore against the vessel to recover the "lien," not only because the Supreme Court has said so in *Burnside* but also because the legislative intent can be readily seen as requiring such a result. The balance struck frees the employer from indirect suit by plaintiff for his actual damages and the counsel fee claim of the shipowner in exchange for certain liability for compensation in every case, even, arguably, when it has not been negli-

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[20]The employee can have the Board order (award) payment by the employer of *all* compensation benefits to which he is entitled, without causing an assignment. The employee's liability can now be made certain without affecting an employer's right to sue. Of course, this was *not* the case before 1959.

gent but most certainly when it has. A further reason for this balance rather than the one found below, is seen in the development of the maritime law prior to the amendments, which proceeded in a way consistent only with the implicit understanding that the stevedore generally had the last chance to avoid a longshoreman's injury.[21]

CONCLUSION

The lien on proceeds approach to the treatment of the stevedore's right to recoup compensation is an obsolete concept. It was a product of a belief which the Supreme Court has now said was mistaken—that the 1938 Amendment to the Act cut off all rights of an employer to sue to recover its damages (its compensation liability) from a negligent third party-shipowner. The court's *Halcyon* and *Pope & Talbot* decisions, which assumed this treatment of the stevedores' right, were motivated by a concern about the importance of preserving the rights of the employee, since to make issue of the employer's rights in the employee's suit, under the Act prior to 1959, might have meant loss of right to resort to available compensation, or the employee's loss of control of his suit because his rights were not *then* adequately guaranteed by the Act. Congress achieved the purposes sought to be served by these decisions and responded to *Ryan* and *Baccile* by enacting the 1959 Amendments to Section 933 (a) and (b) which disposed of concern about the employee's rights as a proper basis for resolving the *inter se* rights of the employer and the shipowner. Under the new Act the continuing concern for the paramount right of the employee may require, affirmatively, that the stevedore be treated as the possessor of a right to sue rather than a right to obtain automatic recovery upon

[21] See *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964).

proof of vessel negligence. This in order that the employee should not be encouraged to forego his compensation rights to make possible a settlement acceptable to the employer, who will be encouraged through the device of a "lien" to abandon its concern for employee safety, which Congress has said the Act intended to reinforce. The stevedore/employer must not be permitted to "off load its entire compensation liability" on a trivially negligent shipowner.

Not only has Congress' statement of purpose provided the incentive for the interpretation urged above, that the stevedore has a claim subject to defeat by proof of its negligence, but it has also provided a remedy in the plain langauge of Section 905(b) which requires suit by an otherwise entitled stevedore. If this contention is not, however, accepted, if the stevedore has not such a statutory remedy, it is nonetheless entitled to sue by virtue of *Burnside,* and the rule of that case survives the enactment of Section 905(b). The *Halcyon* rule applies to the stevedore's suit whether by statute or under the maritime law in order to preserve the equitable balance intended by Congress. This balance, as interpreted by the court below, is inequitable to such degree that it might render the statute unconstitutional, although that issue was not raised below and is not raised here.

Congress has not relieved the employer of its liability for indemnity in exchange for liability for increased compensation benefits for which ultimately it will not have to pay. Nor does it serve to say that the shipowner's liability to the employee is reduced and that this is the sufficient and intended benefit accorded it under the Act. The exchange for this benefit, and only experience will tell what benefit this will be, is elimination of indemnity. Not elimination of indemnity and shifting of compensation liability where the stevedore has been negligent. *Sieracki* and *Ryan* are overruled but the result of *Pope & Talbot* is not restored since it is no longer needed and is contrary to congressional pur-

pose. There is no longer *any* justification for special treatment of the stevedore's interest.

In exchange for assuming one additional obligation (initially to pay increased compensation benefits) the stevedore seeks to gain two advantages—to be free of indemnity for plaintiff's actual damages *and* ultimate liability for compensation.

Respectfully submitted,

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